FILED
JAN 5 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-572

In the Supreme Court of the United States

IN RE GRAND JURY PROCEEDINGS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REDACTED

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

STEPHAN E. OESTREICHER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the district court's order denying petitioners' motion for return of property under Federal Rule of Criminal Procedure 41(g) was immediately appealable, where the government had already returned the property and the district court and court of appeals found that the motion sought the suppression of evidence.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 8

TABLE OF AUTHORITIES

Cases:

Andersen v. *United States*:
298 F.3d 804 (9th Cir. 2002), cert. denied, 538 U.S. 977 (2003) 7, 8
538 U.S. 977 (2003) 8
Angel-Torres v. *United States*, 712 F.2d 717 (1st Cir. 1983) 7
Cogen v. *United States*, 278 U.S. 221 (1929) 5
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) 4
DiBella v. *United States*, 369 U.S. 121 (1962) 3, 4, 5
Flanagan v. *United States*, 465 U.S. 259 (1984) 3, 4
Grand Jury Proceedings (Berry), In re, 730 F.2d 716 (11th Cir. 1984) 6
Grand Jury Proceedings (Young), In re, 716 F.2d 493 (8th Cir. 1983) 7
Imperial Distribs., Inc. v. *United States*, 617 F.2d 892 (1st Cir.), cert. denied, 449 U.S. 891 (1980) 6
Search of 949 Erie St., In re, 824 F.2d 538 (7th Cir. 1987) 6, 7

Cases—Continued: Page

Search of the Premises Known as 6455 S. Yosemite, In re, 897 F.2d 1549 (10th Cir. 1990) 7
United States v. *Calandra*, 414 U.S. 338 (1974) 3
United States v. *Furina*, 707 F.2d 82 (3d Cir. 1983) 7
United States v. *Glassman*, 533 F.2d 262 (5th Cir. 1976) 7
United States v. *Regional Consulting Servs. for Econ. & Cmty. Dev., Inc.*, 766 F.2d 870 (4th Cir. 1985) 7
Warrant Dated Dec. 14, 1990, In re, 961 F.2d 1241 (6th Cir. 1992) 5, 7, 8

Constitution, statute and rule:

U.S. Const. Amend. IV 3
28 U.S.C. 1291 ..... 3, 4, 7
Fed. R. Crim. P. 41(g) 3, 5, 6, 7

In the Supreme Court of the United States

No. 05-572

IN RE GRAND JURY PROCEEDINGS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REDACTED

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-5a) is unreported. The memorandum of the district court (Pet. App. 18a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2005. A petition for rehearing was denied on July 19, 2005 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on October 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a search warrant issued in connection with an ongoing grand jury investigation [REDACTED], federal agents searched [REDACTED] and seized [REDACTED]. Pursuant to a grand jury subpoena, [REDACTED]. Although the government re-

turned [REDACTED], and made the paper documents available to petitioners for copying, petitioners filed a motion for the return of all copies of anything seized by the government. Pet. App. 20a-21a. Following a hearing, the district court denied the motion. *Id.* at 11a-28a. The court of appeals concluded that it lacked jurisdiction and dismissed the appeal. *Id.* at 1a-5a.

1. [REDACTED], in connection with an ongoing grand jury investigation, a magistrate judge [REDACTED] approved the issuance of a search warrant [REDACTED]. Pet. App. 19a. Pursuant to the warrant, federal agents searched [REDACTED]. Pursuant to a grand jury subpoena issued shortly thereafter, agents obtained [REDACTED]. Pet. 4.

Within a few days of obtaining the documents, the government had made copies [REDACTED] had returned [REDACTED]. [REDACTED]; Pet. App. 4a, 11a, 20a. The government further offered to make the paper documents available to petitioners for copying. [REDACTED]; Pet. App. 20a. Nevertheless, [REDACTED], petitioners filed a motion under Federal Rule of Criminal Procedure 41(g) seeking an order "directing the return of all property and information, [REDACTED]." Mot. 1-2 (emphasis added); Mem. in Supp. 10-11.

2. [REDACTED], the district court held a hearing on the motion for return of property [REDACTED]. Although the government emphasized that it had already returned petitioners' property, [REDACTED], petitioners argued [REDACTED].

The district court denied the motion, explaining that petitioners, in seeking a return of *all copies* of their property, were essentially making a motion to suppress:

[REDACTED].

Pet. App. 11a.

On [REDACTED], the court issued a memorandum opinion further explaining its decision. The court reiterated that because petitioners' motion sought "[REDACTED]," it was tantamount to a motion for suppression of evidence. Pet. App. 21a, 26a-27a. The court held that such relief was inappropriate at the pre-indictment stage of proceedings because under *United States* v. *Calandra*, 414 U.S. 338 (1974), one who has not been criminally charged has no standing to invoke the Fourth Amendment exclusionary rule, Pet. App. 21a-22a; and because petitioners' case was not the rare one in which equitable considerations warranted return or destruction of all copies under Rule 41(g), inasmuch as petitioners did not establish any concrete harm from the government's retention of the copies, *Id.* at 22a-28a.

3. The court of appeals dismissed the appeal for lack of jurisdiction under 28 U.S.C. 1291. Pet. App. 1a-5a. The court explained that in criminal cases, Section 1291 generally provides for appellate review only "after conviction and imposition of sentence." Pet. App. 3a (citing *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984)). The court recognized that *DiBella* v. *United States*, 369 U.S. 121 (1962), provides for a limited exception permitting immediate review of a pre-indictment order denying a motion for return of property where the motion "[1] is solely for the return of property and [2] is in no way tied to a criminal prosecution in esse against the movant." Pet. App. 3a (quoting *DiBella*, 369 U.S. at 131-132). The court of appeals concluded that the *DiBella* exception did not apply to this case, however, because "it is evident that [the petitioners] seek more than just the return of

property; they seek the suppression of evidence" in that petitioners were essentially seeking only copies of documents retained by the government. *Id.* at 4a.

ARGUMENT

Petitioners argue that the denial of their motion for return of property was subject to an immediate appeal because (1) their motion did not seek the suppression of evidence but was solely for the return of property, Pet. 11-13; and (2) the motion was not tied to an existing criminal prosecution against petitioners because the grand jury had not yet charged anyone with a crime, *id.* at 13-16. With regard to the latter issue, petitioners contend (*id.* at 16-21) that this Court should grant certiorari to resolve a conflict in the circuits over when there is "a criminal prosecution in esse" under *DiBella*. The court of appeals properly dismissed the appeal based solely on the first prong of *DiBella*, however, and accordingly any conflict of authority as to the second prong does not warrant further review of this case.

1. Federal courts of appeals generally have jurisdiction only over "final decisions" of district courts. 28 U.S.C. 1291. The final judgment rule "is strongest in the filed of criminal law," *Flanagan*, 465 U.S. at 264, because "delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *DiBella*, 369 U.S. at 126. This Court has recognized narrow exceptions to the final judgment rule for orders deemed "collateral to the principal litigation because touching matters that will not 'affect, or * * * be affected by, decision of the merits of [the] * * * case.'" *Ibid.* (quoting *Cohen* v. *Beneficial Indus. Loan Corp.*, 337

U.S. 541, 546 (1949)) (alteration and ellipses in original). One such exception was enunciated in *DiBella*, which permits immediate appeal of an order denying a motion "solely for return of property" because such a motion can fairly "be regarded as independent" of the merits of the pending or impending criminal case. *Id.* at 131-132. *DiBella* makes clear, however, that "[n]o such severability inheres in a motion seeking the suppression of evidence" because disposition of a suppression motion "'will necessarily determine the conduct of the trial and may vitally affect the result.'" *Id.* at 127 (quoting *Cogen* v. *United States*, 278 U.S. 221, 223 (1929)).

Petitioners contend (Pet. i, iii, 7, 9, 10, 12, 13) that their motion did not seek suppression of evidence but rather the return of property. That fact-bound assertion was properly rejected by both courts and does not merit further review. As the district court noted, Pet. App. 11a, and petitioners have not disputed, the government had already returned all of the property that was the subject of petitioners' motion or made documents available to petitioners for copying. Thus, both courts properly found that, in seeking to disposses the government of all *copies* [REDACTED], petitioners' primary aim was to divest the government of the use of any evidence obtained from petitioners and that the relief they sought was thus tantamount to suppression. *Id.* at 4a, 11a.

Petitioners err in relying on the fact that they did not explicitly seek the suppression of any of the materials seized. *E.g.*, Pet. 7. The courts of appeals that have addressed the matter have uniformly held that "we must look behind the Rule 41[(g)] motion and determine whether the motion essentially sought return of seized property or suppression, delay, or some other such purpose apart from the return of the property." *In re War-*

rant Dated Dec. 14, 1990, 961 F.2d 1241, 1244 (6th Cir. 1992) (*Hubbard*); see *id.* at 1244-1245 (rejecting the movants' argument that their motion "was not primarily for suppression of evidence" because in substance the motion clearly did seek suppression: "[t]he government * * * stated that it did not oppose granting [the movants] access to the seized records for purposes of conducting and carrying on their business" (internal quotation marks omitted)); *Imperial Distribs., Inc.* v. *United States*, 617 F.2d 892, 895 (1st Cir.) ("Appealability cannot turn on the title of the motion."), cert. denied, 449 U.S. 891 (1980); *In re Search of 949 Erie St.*, 824 F.2d 538, 541 (7th Cir. 1987) (*Erie*) ("[I]n determining jurisdiction to review an order denying Rule 41[(g)] relief, a court must look beyond the face of the motion. * * * Suffice it to say that where the government has offered to provide copies and the movants have not even attempted to show that copies are inadequate * * *, we cannot find that the motion is directed primarily toward the return of the seized property."); *In re Grand Jury Proceedings (Berry)*, 730 F.2d 716, 717-718 (11th Cir. 1984) (per curiam) (*Berry*) (dismissing appeal "although the appellants' motion did not specifically seek to suppress the items seized" because "it is obvious from a reading of the motion that appellants are attacking the validity of the search and seizure under the [F]ourth [A]mendment").

Petitioners do not claim that there exists a conflict of authority on this first prong of the *DiBella* exception. They argue instead that the court of appeals "effectively [held] that *every* motion for return of property is to be considered a suppression motion." Pet. 11-12. That is not correct. The court simply found, upon reviewing the specific facts of this one case, that "it is evident that *Ap-*

pellants seek more than just the return of property; they seek the suppression of evidence." Pet. App. 4a (emphasis added).

2. Petitioners also argue (Pet. 16-21) that the Court should grant review in order to resolve a conflict in the circuits about when there is "a criminal prosecution in esse" under the second prong of *DiBella*. The First, Sixth, Seventh, Eighth, and Tenth Circuits have held that a motion for the return of property is not tied to a criminal prosecution in esse until the defendant has been formally charged with a crime. *Hubbard*, 961 F.2d at 1243; *Erie*, 824 F.2d at 540; *In re Grand Jury Proceedings (Young)*, 716 F.2d 493, 496 (8th Cir. 1983); *Angel-Torres* v. *United States*, 712 F.2d 717, 719 (1st Cir. 1983); *In re Search of the Premises Known as 6455 Yosemite*, 897 F.2d 1549, 1554-1555 (10th Cir. 1990). By contrast the Third, Fourth, Fifth, Ninth, and Eleventh Circuits have concluded that immediate review of a denial of a motion for return of property is not available when a criminal investigation is pending. *United States* v. *Furina*, 707 F.2d 82, 84 (3d Cir. 1983); *United States* v. *Regional Consulting Servs. for Econ. & Cmty. Dev., Inc.*, 766 F.2d 870, 874 (4th Cir. 1985); *United States* v. *Glassman*, 533 F.2d 262, 263 (5th Cir. 1976); *Andersen* v. *United States*, 298 F.3d 804, 808 (9th Cir. 2002), cert. denied, 538 U.S. 977 (2003); *Berry*, 730 F.2d at 717.

This case does not represent an appropriate vehicle for review of that conflict, however, because the outcome in this case would be the same even if petitioners prevailed in contending that a criminal prosecution is not "in esse" until formal charges are brought. A movant under Rule 41(g) must satisfy *both* prongs of *DiBella* to justify departure from the usual "final judgment rule" under 28 U.S.C. 1291. As discussed, both courts below

held that petitioners essentially sought the suppression of evidence. No circuit would permit immediate appeal on such facts. *Hubbard*,961 F.2d at 1243, 1245 (holding that the motion at issue was "not 'tied to a criminal prosecution in esse'" because the movant "ha[d] not yet been charged or indicted," but nevertheless dismissing an interlocutory appeal from a denial of the motion because the motion "was not 'solely for the return of property'"); *Erie*, 824 F.2d at 540-541 (same). Indeed, the Court recently denied review of this circuit conflict in *Andersen* v. *United States*, 538 U.S. 977 (2003), a case in which the Ninth Circuit had held that a criminal prosecution is "in esse" whenever a grand jury proceeding is underway, but nevertheless dismissed the appeal because the motion "[sought] relief beyond 'solely' the return of property." *Andersen*, 298 F.3d at 808.

There is no reason for a different result in this case. Review would be even more unwarranted here, where the court of appeals dismissed petitioners' appeal without explicitly addressing whether there existed a criminal prosecution in esse in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
STEPHAN E. OESTREICHER
Attorney

JANUARY 2006